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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 218

STANDARD GAS AND ELECTRIC COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TOGETHER WITH

Record in the Court of Appeals (Appendix A).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered on April 19, 1954.

The judgment of the Court of Appeals affirmed a judgment of the District Court for the District of Minnesota which affirmed an order of the Securities and Exchange Commission (the Commission) in proceedings under Section 11(e) of the Public Utility Holding Company Act of 1935 (the Act) for liquidation of Northern States Power Company, a Delaware corporation, and for reorganization of said Company's subsidiary, Northern States Power Company, a Minnesota corporation. The Commission's said order directed, *inter alia*, that the approved fees and expenses of Petitioner's counsel in said reorganization,

aggregating $87,994.14, be not paid by the Northern States Companies (as provided in the Plan) but by Petitioner itself.

Opinions Below.

The findings, opinion and order of the Securities and Exchange Commission (R. 222-246; HCAR No. 11145)[1] are unreported. The opinion of the District Court for the District of Minnesota (R. 266-288) is reported in 119 F. Supp. 331. The opinion of the Court of Appeals (App. 29-40) is reported in 212 F. 2d 407.

Jurisdiction.

The judgment of the Court of Appeals was entered April 19, 1954 (App. 41). The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U. S. C. §1254(1) and 49 Stat. 835, 15 U. S. C. §79x (a).

Statutes Involved.

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, *et seq.*, 15 U. S. C. §79a, *et seq.*), the Administrative Procedure Act (60 Stat. 237, as amended, 5 U. S. C. §1001, *et seq.*), and the Bankruptcy Act (52 Stat. 883, *et seq.*, 11 U. S. C. §501, *et seq.*) are set forth in Appendix B, *infra* (App. 42-44).

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[1] The letter "R." refers to pages of the record as filed in the Court of Appeals. The letters "App." refer to pages of the Appendices hereto (Appendix A being the opinion and judgment of the Court of Appeals, and Appendix B being applicable statutory provisions). The letters "HCAR" refer to Releases issued by the Commission under the Act.

Questions Presented.

The questions presented are:

1. Does the Commission have jurisdiction, under the Act, to fix the fees and expenses of a parent holding company in proceedings under Section 11(e) of the Act for the reorganization of a subsidiary and to order the payment of such fees and expenses by the parent rather than by the subsidiary in reorganization?

[Note: This is the question presented in *Securities and Exchange Commission* v. *Drexel & Company*, No. 153, October Term, 1954, now pending before this Court.]

2. In a proceeding under Section 11(e) of the Act is the reviewing court authorized by the Act, the Administrative Procedure Act, or otherwise, to affirm a decision of the Commission upon grounds not found by the Commission; and, if so, can the reviewing court itself make the findings of fact necessary to support such grounds?

3. Is the fixing of fees and expenses in proceedings under Section 11(e) of the Act governed by the principles applicable to proceedings under Chapter X of the Bankruptcy Act; and, if so, may their applicability to Petitioner be avoided on the ground that Petitioner was the "statutory parent" of the subsidiary in reorganization when the Act was passed and thus was "responsible" for "complexities" in the subsidiary's system?

[Note: This, in major part, is the main question presented in *The United Corporation* v. *Securities and Exchange Commission*, No. 99, October Term, 1954, now pending before this Court.]

4. Was the denial of reimbursement of Petitioner's expenses, to which it is clearly entitled under established reorganization principles, in accord with legal standards when it appears that—

(a) Petitioner ceased to be a "statutory parent" of the Northern States Power Companies long before performing the services for which reimbursement is sought,

(b) the Act does not impose any penalty for merely being, or having been, a "statutory parent,"

(c) Petitioner was not found to have been guilty of any abuses or wrongdealing in respect of the Northern States Power Companies,

(d) the Northern States reorganization was not a part of, or a necessary step in, Petitioner's own reorganization under the Act, and

(e) the Commission did not specify the alleged "complexities" for which Petitioner was "responsible" or make any findings upon which such responsibility could be based?

[Note: In large part, this question also is presented in *The United Corporation* v. *Securities and Exchange Commission*, No. 99, October Term, 1954, *supra*.]

Statement.

Prior to 1910, Northern States Power Company, a Delaware corporation (the Delaware Company) acquired all the preferred and common stocks of Northern States Power Company, a Minnesota corporation (the Minnesota Company) (R. 16-17).[2] Subsequently, Petitioner, which was

[2] Said two last mentioned Companies are referred to herein collectively as the Northern States Companies.

organized in 1910, acquired stock of the Delaware Company, and, in 1935, when the Act was passed, it was the statutory parent of that Company (since it owned 10% or more of its voting securities), owning all but 83 of the 729,166 shares of Class B common stock, and 11,600 shares, or 3.4%, of the Class A common stock, together constituting 40% of the voting power of the Delaware Company (R. 5-6, 74-75, 238).

In April, 1938, promptly after the validity of the Act had been upheld (see *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419), both Petitioner and the Delaware Company registered under the Act (R. 1), and a few months later, the Northern States Companies filed with the Commission applications for a plan of recapitalization, which were approved in December, 1938 (R. 2-9). This plan provided, *inter alia*, for the cancellation, effective January 1, 1941, of the voting rights of the Class B common stock of the Delaware Company (R. 5-6), so that as of that date (R. 224, 239, 241), *Petitioner ceased to be a statutory parent as to the Northern States Companies.*

Thereafter, in June, 1942, the Delaware Company filed its first plan for dissolution under Section 11(e) of the Act (R. 225). Petitioner, as a large stockholder, intervened in the hearings on said plan, and participated therein.

In October, 1945, said first plan, as later amended (First Amended Plan), was approved by the Commission (R. 14-27, 28-30, 225). Under this plan the common stockholders of the Delaware Company, both A and B, were allocated 9.56% of the reclassified common stock of the Minnesota Company, of which 8.32% went to the A stockholders and 1.24% to the B stockholders, *i. e.*, chiefly, Petitioner (R. 18).

Thereafter, the Commission applied to the District Court for an order enforcing the First Amended Plan (R. 32, 92, 225). While this application was pending, a

group of Petitioner's stockholders, headed by C. A. Johnson (the Johnson Group), intervened before both the Commission and the District Court and objected to the First Amended Plan, contending that it was unfair to *all the common stockholders* of the Delaware Company because, *inter alia,* it was predicated upon too low a forecast of foreseeable earnings of the Minnesota Company (R. 32, 93-95, 146-153, 225, 240). In large part as a result of such intervention (R. 93-94), the District Court hearings were adjourned, and further hearings held before the Commission, as a result of which the Commission rescinded its order approving the First Amended Plan (R. 33, 41).

In December, 1947, the Delaware Company filed its second plan which, after extended hearings, and as later modified (Second Amended Plan or the Plan), was approved by the Commission (R. 58-59, 60-68), and, subsequently, by the District Court (R. 69-72; 80 F. Supp. 193). In its order enforcing the Plan the Court took jurisdiction of the Delaware Company and all its assets (R. 71); it did not assume any jurisdiction over Petitioner and its assets (R. 69-72).

Both Petitioner and the Johnson Group, through their counsel, actively participated in the proceedings on the Second Amended Plan. Under said Plan, in major part the result of efforts of Petitioner, the Johnson Group, and their respective counsel (R. 241), the allocations of common stock of the Minnesota Company to the common stockholders of the Delaware Company as a class were substantially increased (as compared to the First Amended Plan) from 9.56% to 22.01%, the participation of the Class A stockholders being increased from 8.32% to 18.82%, and that of the Class B stockholders from 1.24% to 3.19% (R. 58).

The Second Amended Plan provided that the Delaware Company should pay such fees and expenses of attorneys and others as the Commission should approve (R. 58, 248). At hearings before the Commission on the fee applications, including those of counsel for Petitioner and the Johnson Group (R. 73-118), the Northern States Companies submitted "recommendations" (R. 192-206) in which they stated that Petitioner's representatives had made "substantial contribution" to the proceedings and plan (R. 198, 201, 205), and recommended that such representatives be granted an aggregate allowance of $45,000, plus expenses, to be paid *by the Delaware Company* (R. 206).

In May, 1951, the Commission's Staff filed a "Statement of Views", finding that Petitioner's representatives had made substantial contributions to the Plan and the proceedings, and recommending allowances aggregating $87,994.14 (R. 217, 220, 221). The Staff, however, although conceding (R. 220) that *"technically the Commission may not cast an obligation upon Standard or determine the amount thereof in this proceeding"*,[3] recommended that these allowances be paid by Petitioner and not allowed as claims against the Delaware Company, since "a statutory parent may not be reimbursed for the fees and expenses of its own counsel in a proceeding for reorganization of its subsidiaries as required by Section 11" (R. 216-217).

On April 8, 1952, the Commission entered its order approving the Staff's recommendations as to Petitioner's representatives and directing that said allowances be denied as claims against the Delaware Company; but, brushing aside the Staff's views as to the Commission's lack of power, ordered that the allowances be approved as claims against Petitioner itself (R. 246). Not disputing

[3] All italics in quotations herein are supplied unless the contrary is noted.

Petitioner's contributions to the proceedings, the Commission said that Petitioner "was the parent of the Delaware Company when the complexities were created which we found were required to be eliminated under the Act", that Petitioner "was responsible for these complexities", and that "Equity demands that its fees and those of counsel representing it or its stockholders should be borne by it alone, and not by the Delaware Company" (R. 241).

On January 12, 1953, and by order of March 3, 1953 (R. 289-293), the District Court affirmed the Commission's order as to Petitioner (R. 288). Without expressing an opinion as to the theory upon which the Commission denied Petitioner's claim, the District Court approved the Commission's order upon entirely new grounds—not predicable on any findings of the Commission —*i. e.*, on the grounds that Petitioner's activities in the Northern States reorganization were "directed to the benefit of its own claim and any benefit which inured to the estate or any class of creditors was merely incidental to its principal purpose" (R. 287), the Court further stating that "Standard was itself the class which was benefited by its contribution to the plan", and that "It is elementary that a successful litigant should pay its own counsel" (R. 287).

Upon appeal the District Court's order was approved by the Court of Appeals (App. 29-41), which rested its decision not only on the grounds relied upon by the Commission (which were not adopted by the District Court), but also upon the grounds advanced by the District Court (which were not invoked by the Commission). The Court of Appeals acted primarily on the ground that "the burden of participation in such proceedings should fall on the holding company responsible for creating the conditions which must be eliminated" (App. 34), stating that "It is entirely in accord with fairness that it [Petitioner]

should pay its own fees and expenses in effecting *compliance on its part* with the requirements of the Act" (App. 33). In reaching this conclusion the Court of Appeals—

(a) ignored the fact that the record does not show that Petitioner was "responsible for creating the conditions" which were eliminated in the Northern States system,

(b) erroneously assumed that in the Northern States reorganization Petitioner was "effecting compliance on its part with the requirements of the Act," and

(c) failed even to mention the contrary decision of *In re Electric Power & Light Corp.*, 210 F. 2d 585 (2d Cir. 1954), now pending on petition for certiorari, *Securities and Exchange Commission* v. *Drexel & Company*, No. 153, October Term, 1954, in which the Court of Appeals for the Second Circuit held that the reorganization of a subsidiary was not a part of the reorganization of the parent.

Reasons for Granting the Writ.

1. The Judgment Sought to be Reviewed is in Conflict with In re Electric Power & Light Corp., 210 F. 2d 585 (2d Cir. 1954), petition for certiorari pending, Securities and Exchange Commission v. Drexel & Company, No. 153, October Term, 1954.

The judgment sought to be reviewed not only denied Petitioner reimbursement of its counsel fees and expenses from the Northern States Companies; it fixed the amount of such fees and expenses and ordered Petitioner to pay same (R. 246, 292; App. 41). This holding is in direct conflict in substantial part, and overall in basic conflict, with the decision of the Court of Appeals for the Second

Circuit in *In re Electric Power & Light Corp.*, 210 F. 2d 585 (2d Cir. 1954), now pending on petition for certiorari, *Securities and Exchange Commission* v. *Drexel & Company*, No. 153, October Term, 1954.

In that case Electric Bond and Share Company participated in the reorganization, under Section 11(e) of the Act, of its subsidiary, Electric Power & Light Corporation, and in doing so incurred substantial expenses, including a fee of Drexel & Company of $100,000 for financial services. As in the case at bar, the Commission denied the parent reimbursement from the subsidiary.[4] It then proceeded to cut the fee payable to Drexel & Company from $100,000 to $50,000, which reduced amount it ordered the parent to pay. Upon appeal by Drexel & Company, the Court of Appeals held that the Commission was without jurisdiction to determine the fees which the parent should pay for services rendered to it in the reorganization of its subsidiary and to order the parent to pay the fees so determined.

Thus, the decision in the *Electric Power & Light Corporation* case is in direct conflict with the judgment here sought to be reviewed to the extent that the Court of Appeals for the Second Circuit held that the Commission was without jurisdiction to determine what fees the parent should pay for services rendered to it in the reorganization of the subsidiary.

Actually, however, the conflict is much broader than above stated. In overruling the Commission's holding

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[4] See, *In re Electric Power & Light Corporation*, HCAR No. 11175 (1952). The parent did not appeal from the Commission's denial of reimbursement from the subsidiary apparently because the Commission found that the services for which the parent sought reimbursement were "inextricably intertwined" with services spent in unsuccessfully defending itself against "Deep Rock" claims for wrongful acts against the subsidiary.

No such finding was, or could be, made in the case at bar.

that it has "jurisdiction to supervise all fees and expenses which are paid by a registered holding company whether they be paid by the company reorganized or another registered holding company of which the reorganized one is a subsidiary", the Court of Appeals for the Second Circuit specifically rejected the Commission's "reasoning" that "as Electric was a subsidiary of Bond and Share which was required to comply with the provisions of the Act, its dissolution in these proceedings was a step taken, and necessarily taken, in bringing Bond and Share into compliance with the statute" (210 F. 2d at 588). In direct conflict with this reasoning, the Court of Appeals in the case at bar squarely predicated its decision denying reimbursement to Petitioner on the ground that it was, in effect, seeking reimbursement for "effecting compliance on its part with the requirements of the Act" (App. 33).

Although in its own opinion in the case at bar (the first of a number denying reimbursement to the parent)[8] the Commission did not find that the reorganization of the Northern States Companies was a necessary part of Petitioner's own reorganization, this has been the chief ground relied upon by the Commission in every subsequent case in which the Commission denied reimbursement to a parent. See, for example, *In re Public Service Corporation of New Jersey*, HCAR No. 12000 (1953), aff'd in part, *United Corp. v. Securities and Exchange Commission*, 211 F. 2d 231 (3d

[8] Until its decision as to Petitioner in the Northern States fee proceedings, which initiated a new line of decisions involving parent corporations, the Commission treated the parent or former parent in Section 11(e) proceedings in the same manner, in the matter of fees and expenses, as any other holder, or group of holders, of securities of such holding company. See, *In re Consolidated Electric and Gas Company*, HCAR No. 8468 (1948); *In re New England Gas and Electric Association*, HCAR No. 8742 (1948); *In re North Shore Gas Company*, 13 S. E. C. 139, 149 (1943) and *In re Laclede Gas Light Company*, HCAR No. 6954 (1946).

Cir. 1954), now pending on petition for certiorari, *The United Corporation* v. *Securities and Exchange Commission*, No. 99, October Term, 1954; *In re Eastern Gas & Fuel Associates*, HCAR No. 11954 (1953), aff'd in part, 120 F. Supp. 460 (D. Mass, 1953), appeal pending in Court of Appeals for the First Circuit; *In re Niagara Hudson Power Corp.* HCAR No. 11667 (1953), aff'd, 114 F. Supp. 683 (N. D. N. Y. 1953), appeal pending in the Court of Appeals for the Second Circuit.

Moreover, in its petition for certiorari in *Securities and Exchange Commission* v. *Drexel & Company*, No. 153, October Term, 1954, the Commission states (p. 20):

> "In many systems similar to Bond and Share's the top company can bring itself into compliance with the Act only through the elimination or reorganization of its subsidiary companies. * * * In a strict corporate sense the reorganization may be the reorganization of a subsidiary, but in the terms of the act it is a step toward bringing the whole system into conformity with the standards of the Act, and, in order that all security holders may be protected, all phases of it must be subject to Commission jurisdiction."

In the case at bar the Court of Appeals adopted the theory set forth in the above quotation (without any foundation in the record), in direct conflict with the basic concept of the Court of Appeals for the Second Circuit in the *Electric Power and Light Corporation* case.

We respectfully submit that this Court should decide this basic conflict.

2. The Judgment Sought to be Reviewed Presents an Important Question of Federal Law Which Should be Settled by this Court.

The main issue involved in the case at bar (although on the facts Petitioner's case is stronger than the other pending cases) is also involved in the following pending cases, in which the Commission denied reimbursement to a parent corporation: *In re Public Service Corporation of New Jersey,* HCAR No. 12000 (1953), aff'd in part, *United Corporation* v. *Securities and Exchange Commission,* 211 F. 2d 231 (3d Cir., 1954), now pending on petition for certiorari, *The United Corporation* v. *Securities and Exchange Commission,* No. 99, October Term, 1954; *In re Eastern Gas & Fuel Associates,* HCAR No. 11954 (1953), aff'd in part, 120 F. Supp. 460 (D. Mass., 1953), appeal pending in the Court of Appeals for the First Circuit; and *In re Niagara Hudson Power Corporation,* HCAR No. 11667 (1953), aff'd, 114 F. Supp. 683 (N. D. N. Y., 1953), appeal pending in the Court of Appeals for the Second Circuit.

Basically, as shown above, the same issue is also involved in *In re Electric Power & Light Corporation,* HCAR No. 11175 (1952), aff'd December 23, 1952 (S. D. N. Y.), reversed in part, *In re Electric Power & Light Corporation,* 210 F. 2d 585 (2d Cir., 1954), now pending on petition for certiorari, *Securities and Exchange Commission* v. *Drexel & Company,* No. 153, October Term, 1954.

Because of these cases now pending in the courts, and other like cases pending before the Commission which will eventually reach the courts, we submit that review by this Court of the judgment of the Court below is necessary in the interests of the proper functioning of the Commission

and the lower federal courts, to the end that the many possible litigants affected may secure prompt, correct and final adjudication of their claims. In this connection the Commission asserts in its petition in the *Electric Power & Light Corporation* case, No. 153, present term (p. 23):

> "There are presently pending before the Commission in various stages at least four reorganizations, where fee applications have been filed and the question at issue is involved. In the case of the Standard Power & Light Corporation system, the claims which involve this issue, in whole or in part, run over $3,500,000. In the United Corporation, Northern New England and Pennsylvania Gas and Electric systems comparable issues are involved."

Furthermore, as made clear later herein, review of the instant case by this Court is not only of importance in respect of the particular cases, and class of cases, above cited, but in respect of the scope and manner of judicial review under the Administrative Procedure Act of administrative rulings, and the fixing of allowances for fees and expenses in reorganization proceedings generally.

3. In Sustaining the Commission's Decision on Grounds Not Invoked by the Commission, the Judgment Sought to be Reviewed is in Conflict with Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 (1943), and Securities and Exchange Commission v. Chenery Corp., 332 U. S. 194 (1947), and other cases.

The Commission denied reimbursement to Petitioner on the following ground (R. 241):

> "In the present case Standard, though its position as a holding company over the Delaware Company ceased in 1941, *was the parent of the Delaware*

> *Company when the complexities were created* which we found were required to be eliminated under the Act and which the plan was designed to eliminate. *Standard was responsible for those complexities and thus for the necessity of these proceedings.* Equity demands that its fees and those of counsel representing it or its stockholders should be borne by it alone, and not by the Delaware Company."

After quoting the foregoing, without expressing approval thereof and apparently being unconvinced thereby (R. 286), the District Court undertook to make additional findings of fact (not on the basis of anything in the record), and approved the Commission's order on grounds *not relied on by the Commission and not even argued by Petitioner.* The District Court stated (R. 286-287):

> "• • • although Standard held two classes of stock whose interests were adverse, its primary concern was with the share which should be allocated to the holders of Class B stock in the reorganization. Its activities, therefore, were principally directed to the benefit of that class of stock. • • • Its activity in the reorganization was directed to the benefit of its own claim and any benefit which inured to the estate or any class of creditors was merely incidental to its principal purpose. Standard was itself the class which was benefited by its contribution to the plan. • • • It is elementary that a successful litigant should pay its own counsel."

Since the grounds relied upon by the District Court were completely different than those invoked by the Commission, they could not be availed of by the Court of Appeals to support its approval of the Commission's decision; and in so holding the judgment of that Court is in square conflict with decisions of this Court and other courts.

As stated in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943):

> "• • • an administrative order can not be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

Similarly, in *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194 (1947), this Court said (p. 196):

> "• • • a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.• • •"

While doubt has been expressed as to the extent to which the so-called *Chenery* doctrine is still applicable in view of later decisions of this Court (see, Davis, *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 577-579 (1950)), the *Chenery* cases have been consistently followed by the lower Federal courts. See, *Democrat Printing Co.* v. *Federal Commun. Comm'n*, 202 F. 2d 298, 302-303 (C. A. D. C. 1952); *Mississippi River Fuel Corp.* v. *Federal Power Comm'n*, 163 F. 2d 433, 449 (C. A. D. C. 1947); *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72, 81 (S. D. Cal. 1953).

Review of the judgment below is thus desirable, we submit, in determining the proper construction of the applicable provisions of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. §1009; App. 43-44).

4. The Judgment of the Court of Appeals is Clearly Wrong.

The opinion of the Court below, in effect, consists of a restatement, almost verbatim, of the conclusions of the Commission, which the Court found to be "in accord with fairness", and a restatement, also nearly verbatim, of the conclusions of the District Court, which were found "not to be unreasonable" (App. 33-35). The Court apparently failed to appreciate that the criteria by which fee compensation is judged are *questions of law,* subject to review by the courts in the manner required by Section 10 of the Administrative Procedure Act (App. 43-44). See, *R. F. C.* v. *Bankers Trust Company,* 318 U. S. 163, 169 (1943). The Commission's asserted "policy making" powers, based upon its alleged "expertise" in fee matters, cannot transgress established legal standards. See, *Securities and Exchange Commission* v. *Cogan,* 201 F. 2d 78 (9th Cir. 1951, *opinion on rehearing,* December 22, 1952); *In re North American Light & Power Co.,* 101 F. Supp. 931 (D. Del., 1951), *opinion on rehearing,* 106 F. Supp. 931 (1952), *aff'd,* 202 F. 2d 638 (3d Cir., 1953), *cert. denied sub nom, Securities and Exchange Commission* v. *Masterson,* 346 U. S. 818 (1953); *In re Engineers Public Service,* 116 F. Supp. 930 (D. Del. 1953); *In re United Corp.,* 119 F. Supp. 524 (D. Del., 1954).

The record shows (R. 73-118, 119-186), and the Commission, its Staff and the Court below all found (R. 217-219, 220-221, 239, 242; App. 33), that Petitioner made valuable contributions to the Northern States proceedings and Plan. Having thus conferred benefits upon the Plan and proceedings, Petitioner was clearly entitled under long

established reorganization principles[6] and the express provisions of the Plan (R. 58, 248) to reimbursement of its reasonable expenses from the Northern States estate. The controlling principle was stated by the Commission in this very case (R. 232): "The *touchstone* for determining whether and to what extent compensation is to be allowed from the estate is the *contribution made* to the reorganization."

In departing from this rule on the ground that such departure was required by "equity", the Commission and the courts below failed to follow legal standards.

A. In denying reimbursement to Petitioner on the ground that it was the "statutory parent" when the Act was passed and thus was responsible for "complexities" in the Northern States system, the Commission and the Court of Appeals acted arbitrarily and capriciously, and, in effect, made an unwarranted extension of the "Deep Rock" doctrine.

The Commission did not describe the alleged "complexities" nor make any findings upon which Petitioner's "responsibility" therefor could be based. Petitioner could not have been responsible for the basic complexity in the Northern States system, *i. e.*, the interposition of the Delaware Company as a holding company over the Minnesota Company, since these two companies were organized before Petitioner was created (R. 16-17; App. 31). All that affirmatively appears is that Petitioner was the statutory

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[6] See, Bankruptcy Act, 52 Stat. 900, 11 U. S. C. §643 (§243 of Chapter X, App. 44); *Steere* v. *Baldwin Locomotive Works*, 98 F. 2d 889, 891 (3rd Cir., 1938); *In re Detroit International Bridge Co.*, 111 F. 2d 235, 237 (6th Cir., 1940); *In re Prudence Bonds Corp.*, 122 F. 2d 258, 263 (2d Cir. 1941); *Wisconsin Central Ry. Co. Reorganization*, Interstate Commerce Commission Finance Docket No. 14720, at pp. 36-37, affirmed by the District Court for the District of Minnesota (1953).

parent of the Northern States Companies in 1935 when the Act was passed (R. 5-6, 74-75, 238); and that it ceased to be a parent on December 31, 1940 (R. 7, 224), before the services here in question were performed.

Accordingly, the finding that Petitioner was "responsible" for "complexities" is not supported by substantial evidence, and on this basis alone, the Commission's order should have been held "unlawful and set aside" under Section 10 of the Administrative Procedure Act (App. 43-44). Cf., *Eastern-Central Ass'n* v. *United States,* 321 U. S. 194 (1944).

But even if it be assumed that, prior to 1935, Petitioner brought into being certain corporate relationships which, in 1935, became "complexities" in the Northern States system, the record does not show anything which Petitioner did or failed to do with respect to the Northern States system, prior or subsequent to the Act, which was illegal or improper.

Prior to August 26, 1935, "complexity" in a utility holding company system was not illegal. The Act for the first time made certain complexities, *i. e.,* certain corporate relationships, illegal for the future and required such complexities to be eliminated but *it did not provide any penalties for such past complexities.* The "complexities" to which the Commission refers were thus not "complexities" *prior to the Act.* Accordingly, by denying reimbursement to Petitioner of its expenses in the Northern States proceedings (*i. e.,* by treating Petitioner, as a holder of Delaware Company common stock, on a different basis than any other person holding such stock would have been treated) because, we are now assuming, Petitioner did something which was entirely legal when done, the Commission, without any statutory basis whatsoever, has imposed upon Petitioner a penalty *ex post facto.*

In so doing the Commission, in effect, made a wholly untenable extension of the "Deep Rock" doctrine. See, *Taylor* v. *Standard Gas Co.*, 306 U. S. 307 (1939). Moreover, it applied such extended doctrine not merely to subordinate Petitioner's claim but to deny it completely. Even in a true "Deep Rock" situation, such a result is justified only in cases of flagrant mismanagement. See, for example, *In re American Fuel and Power Co.*, 122 F. 2d 223, 229 (6th Cir., 1941); and cf. *Comstock* v. *Group of Investors*, 335 U. S. 211, 228 (1948). In the case at bar, however, there is no evidence whatever of "fraud", "mismanagement", or "abuses"; and there is no reference to any such inequities in the opinions of the Commission (R. 15-30, 42-68, 207-210, 222-243) or of the courts below (R. 285-288; App. 33-35).

If, indeed, Petitioner had been guilty of improper practices as to the Northern States system, the Commission would have dealt with such matters *in considering Petitioner's treatment under the Northern States Plan, in accordance with accepted "Deep Rock" doctrine.* By its very act of approving the Plan (in which the stock held by Petitioner was treated in the same manner as like stock in the hands of others), the Commission must be deemed to have affirmatively found no fraud or other inequity on the part of Petitioner.

Nor can the decision be rested on the ground the Petitioner was the statutory parent when the Act was passed. Section 11 of the Act places no duty on the companies subject thereto; it merely directs the Commission itself "to require by order" that each registered holding company take such steps as may be necessary to comply with the applicable standards. Moreover, in the case at bar, Petitioner ceased to be a parent long before the Delaware

Company filed its first Section 11(e) plan. Thereafter, Petitioner, without voting rights, acted in the same capacity in the Northern States proceedings *as any other stockholder*, and the reorganization of the Northern States system became the sole responsibility of the Northern States Companies. Since it could not even have filed a Section 11(e) plan for the Northern States Companies, the conclusion of the Commission and the Court of Appeals that the contributions made by Petitioner to the Northern States proceedings were only those required *as a matter of duty* is patently incorrect.

B. The Court of Appeals misconceived both the law and the facts in denying reimbursement to Petitioner on the ground that its services were rendered in "effecting compliance on its part with the requirements of the Act".

Subsequent to its fee opinion in the Northern States case, and apparently recognizing the weakness of the grounds there stated, the Commission developed a new theory for denying reimbursement to a statutory parent. In a series of later cases the Commission, while reasserting that "Holding companies were charged with a statutory duty of bringing their systems into compliance with the standards of the Act * * *" (R. 241), denied reimbursement to the parent primarily on the ground that the reorganization of the subsidiary was a necessary step in the parent's own Section 11(e) reorganization.

Thus, in *In re Eastern Gas & Fuel Associates*, HCAR No. 11954 (1953), aff'd in part, 120 F. Supp. 460 (D. Mass. 1953), now pending on appeal in the Court of Appeals for the First Circuit, Koppers Company, Inc., the statutory parent of Eastern, was denied reimbursement of expenses aggregating $200,000. After pointing out that "Koppers

had voting control over Eastern at all times until the plan was consummated," the Commission said (HCAR No. 11954, at p. 16):

> "• • • *Koppers' own compliance with the Act was directly related to Eastern's compliance.* During these proceedings Koppers was subject to our order issued pursuant to Section 11(b)(1) of the Act requiring it to divest itself of its holdings in Eastern. *This divestment by Koppers was not feasible prior to Eastern's recapitalization* and in all probability could not have been effected until Eastern's recapitalization was accomplished."

To the same effect, in *In re Public Service Corporation of New Jersey,* HCAR No. 12000 (1953), aff'd in part, *United Corporation* v. *Securities and Exchange Commission,* 211 F. 2d 231 (3d Cir. 1954), now pending on petition for certiorari, *United Corporation* v. *Securities and Exchange Commission,* No. 99, October Term, 1954, in denying reimbursement to the parent, the Commission said (HCAR No. 12000, pp. 26-27):

> "Moreover, United's own compliance with the Act was largely dependent upon compliance by its principal subsidiaries, *and it could not resolve its own problems unless and until the problems of the subsidiaries were resolved.* Thus, United's participation in these proceedings had the dual aspect of furthering its own compliance as well as protecting its investment in Public Service."

See, also, *In re Niagara Hudson Power Corp.,* HCAR No. 11667 (1953), aff'd, 114 F. Supp. 683 (N. D. N. Y. 1953), appeal pending in the Court of Appeals for the Second Circuit.

Not realizing that the cases above cited were distinguishable on their facts, and apparently overlooking the contrary decision in *In re Electric Power and Light Corp.*, 210 F. 2d 585 (2d Cir. 1954), now pending on petition for certiorari, *Securities and Exchange Commission* v. *Drexel & Company*, No. 153, October Term, 1954, the Court below affirmed the decision of the Commission primarily on the ground that the expenses for which reimbursement is sought were incurred by Petitioner in carrying out its own reorganization under the Act. Thus, the Court stated (App. 33):

> "It is entirely in accord with fairness that it [Petitioner] should pay its own fees and expenses *in effecting compliance on its part* with the requirements of the Act."

Whatever validity there may be to this theory in some of the cases above cited, it has no application here, since the Northern States reorganization was in no sense a part of, or a necessary precedent to, Petitioner's own compliance with the Act; *and the Commission did not so find.*[7]

Subsequent to the time Petitioner ceased to be a parent, the Commission, on August 8, 1941, ordered Petitioner to dispose of all of its public utility holdings except Philadelphia Company, by far its principal subsidiary. *Standard Power & Light Corporation, et al.*, 9 S. E. C. 862, 872 (1941). The Commission's order did not require any action with respect to its holdings in the Northern States Companies, a minor investment, in connection with or pre-

[7] In its order enforcing the Plan the District Court took jurisdiction of the Delaware Company and all its assets (R. 71). It did not (and necessarily could not, since Petitioner was not a part of the Northern States system) take jurisdiction of Petitioner and its assets. Moreover, in its application to the District Court for an order enforcing its decision, the Commission asked no relief against Petitioner but merely an appropriate order directed to the Northern States Companies (R. 253-254).

liminary to Petitioner's own compliance with the Act; nor did it specify how Petitioner should dispose of its Delaware Company stock. Plainly, so far as the Northern States system was concerned, and without regard to what might happen in any Northern States Section 11(e) proceedings, Petitioner could have complied with the Commission's order of August 8, 1941, by merely selling its Delaware Company common stock or transferring same to its stockholders.

That Petitioner's own compliance with the Act was not dependent upon prior compliance by the Delaware Company, and that consummation of the Northern States reorganization was not a condition precedent to Petitioner's reorganization, *conclusively appears* from the fact that on November 15, 1944, the Commission approved a Section 11(e) plan for the recapitalization of Petitioner. See, *Standard Gas and Electric Company*, 17 S. E. C. 279 (1944). It is true that this particular plan was never consummated because of changed conditions, but the fact that the Commission approved a Standard plan in November, 1944, long prior to its approval of the final Northern States Plan in January, 1948 (R. 58-68), is convincing evidence that Petitioner's compliance with the Act was not dependent upon prior compliance by the Northern States system.

The Court of Appeals thus based its decision on a complete misconception of the facts,—and of the law as well, if the Court of Appeals for the Second Circuit correctly decided the *Electric Power & Light Corporation* case.

C. The Courts below were wholly without justification, in fact or law, in denying reimbursement to Petitioner on the grounds (1) that Petitioner's primary purpose was to benefit the Class B stock, and (2) that Petitioner "was a class in itself".

These additional grounds for denying reimbursement to Petitioner, relied upon by both Courts below, were not invoked by the Commission, whose opinion may be searched in vain for any such findings (see pp. 14-15, *supra*). Indeed, the Court of Appeals' statement that Petitioner's "primary purpose and objective was to secure for the Class B stock the greatest possible participation in the reallocation of Minnesota common stock" (App. 34-35) is in square and puzzling conflict with its own express acknowledgment that "the Commission found that Standard's representatives rendered valuable services to the reorganization proceedings" (App. 33).

The record clearly shows that the efforts of Petitioner's representatives benefited *the entire estate* and not merely the Class B stock (R. 93-96, 115, 203, 218-219, 239-240). For example, as to Petitioner's attorneys, the Commission found that they played a leading part in obtaining the important Stone & Webster report (R. 239) which the Commission said "was of major assistance in the development of the Second Amended Plan" (R. 234). The Commission also found that these attorneys, in an effort to work out a compromise, "presented a substitute plan in which the proposed allocations were substantially the same as those approved in the final plan" (R. 239). As to the attorney for the Johnson Group, the Commission found that he had taken the lead in convincing the Commission that the first Northern States Plan, which it had approved, should be withdrawn, since the prospective earnings of the Minnesota Company were substantially in excess

of those originally estimated by the Commission (R. 93-96, 115, 203, 218, 225). The Commission's Staff specifically found, as to this attorney, that "There is no doubt of his contribution to the proceedings and the plan" (R. 220).

For present purposes it may be conceded that Petitioner's representatives were motivated primarily by a desire to improve the treatment of the Class B common stock, but such motivation is wholly immaterial so far as an allowance is concerned. Every intervenor in a reorganization proceeding is *primary interested in benefiting his particular class.* This does not defeat reimbursement. See, 6 Collier on Bankruptcy, §13.12 (14 Ed. 1947), at pages 4559-4560. In this very case representatives of the Class A stockholders of the Delaware Company received substantial allowances even though the District Court found that they "were all motivated in obtaining the most favorable allocations for this group" (R. 280).

Nor is there any basis for denying reimbursement to Petitioner on the ground, stated by the courts below (R. 287; App. 34), that it was "a class in itself, rather than a true representative of many security holders in a class".

If, as the record establishes, and the Commission has found, Petitioner made valuable contributions to the Northern States Plan, reimbursement may not be disallowed because it or its representatives did not technically appear as class representatives but as representatives of Petitioner itself. The courts and the Commission have repeatedly authorized allowances in reorganization proceedings to *a single stockholder or a single creditor, constituting all or a major portion of the entire class* who has made a contribution to the reorganization proceedings. *Manhattan Company* v. *N. Y. N. H. & H. R. Co.*, 171 F. 2d 482 (2d Cir. 1948); *In re Prudence Bonds Corporation*, 122 F. 2d

258, 263 (2d Cir. 1941); *National City Bank* v. *Saldana Crosas Realty Corporation*, 86 F. 2d 923 (1st Cir. 1936); *In re New England Gas & Electric Association*, HCAR No. 8742 (1948); and see *In re United Light and Railways Co.*, HCAR No. 10724 (1951).

The fact that a participant appears as representative of a larger class may constitute a valid reason for allowing compensation, but the fundamental criterion is always the benefit conferred upon the estate. See, Medill, *Fees and Expenses in a Corporate Reorganization under §77B*, 34 Mich. L. Rev. 331, 347 (1936), which separates this principal ground for contribution from the secondary one of service as a representative of a class.

The Commission itself has always followed this principle. For example, in *In re United Light and Railways Co.*, HCAR No. 10724 (1951), the Commission granted reimbursement of $75,000 for legal fees to Allied Chemical & Dye Corporation, which owned 43.8% of the non-callable preferred stock and 4.31% of the common stock, constituting 10.7% of the voting power, of a holding company in reorganization under the Act. While noting that "Allied did not purport to act as a committee or hold itself out as a representative of any class of securities" (p. 22), the Commission stated as follows (citing several Supreme Court decisions as authority):

> "As to the particular applications, the *primary criterion* is the amount of the benefits conferred upon the company and its security holders by the services performed."

In resting its decision upon the grounds relied upon by the District Court (but not found by the Commission), the Court of Appeals not only departed from a long line of fee decisions in cases under Chapter X of the Bankruptcy Act

(11 U. S. C. §643, App. 44), which the Commission purports to follow,[8] but it founded its decision upon facts which the Commission did not find and which are wholly without support in the record.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MUDGE, STERN, WILLIAMS & TUCKER,
BERNARD NEMTZOW,
Of Counsel.

July 16, 1954.

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[8] In a recent Section 11(e) decision, *In re Engineers Public Service Co.*, 116 F. Supp. 930 (D. Del. 1953) a Commission determination of fees and expenses, which was "at loggerheads with previously announced principles governing allowances of compensation in reorganizations under the Holding Company Act" (p. 935), was reversed by the District Court, which stated (p. 937):

> "Unquestionably, award of compensation for services in connection with reorganization under the Public Utility Holding Company Act of 1935 has been guided by Chapter X practices."

See also *In re York Railways Co.*, 12 SEC 348, 350 (1942); *In re North Shore Gas Co.*, 13 SEC 139, 142 (1943); *In re Laclede Gas Light Co.*, 25 SEC 382 (1947); *In re Electric Bond & Share Co.*, 27 SEC 752, 758-759 (1948).

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 14,871.

STANDARD GAS AND ELECTRIC COMPANY, Appellant,

vs.

SECURITIES AND EXCHANGE COMMISSION, *et al.*, Appellees.

Appeal from the United States District Court for the District of Minnesota.

No. 14,872.

SECURITIES AND EXCHANGE COMMISSION, Appellant,

vs.

NORTHERN STATES POWER COMPANY (Delaware), NORTHERN STATES POWER COMPANY (Minnesota), A. LOUIS FLYNN, FOWLER, YOUNGQUIST, FURBER, TANEY & JOHNSON, and BARRON, RICE & ROCKMORE, Appellees.

Appeal from the United States District Court for the District of Minnesota.

April 19, 1954.

PAUL D. MILLER (MUDGE, STERN, WILLIAMS & TUCKER; MACKALL, CROUNSE, MOORE, HELMEY & PALMER; and BERNARD NEMTZOW were with him on the brief), for appellant in No. 14,871.

MYRON S. ISAACS, Associate General Counsel, Securities & Exchange Commission (WILLIAM H. TIMBERS, General Counsel, and ELLWOOD L. ENGLANDER, Attorney, Securities & Exchange Commission, were with him on the brief), for appellee in No. 14,871.

WILLIAM H. TIMBERS, General Counsel, Securities & Exchange Commission (MYRON S. ISAACS, Associate General Counsel, and ELLWOOD L. ENGLANDER, Attorney, Securities & Exchange Commission), were on the brief for appellant in No. 14,872.

A. LOUIS FLYNN for appellee Flynn in No. 14,872.

G. AARON YOUNGQUIST for appellees, Fowler, Youngquist, Furber, Taney & Johnson, in No. 14,872.

B. S. BARRON for appellee, Barron, Rice & Rockmore in No. 14,872.

Before SANBORN, WOODROUGH and THOMAS, Circuit Judges.

WOODROUGH, Circuit Judge.

These appeals arise out of reorganization proceedings involving the dissolution of the Northern States Power Company of Delaware and the recapitalization of the Northern States Power Company of Minnesota, under Section 11 (e) of the Public Utility Holding Company Act of 1935. 15 U.S.C.A. Section 79. In No. 14,871, Standard Gas and Electric Company (Standard) appeals from an order of the District Judge enforcing an order of the Securities and Exchange Commission (Commission) directing Stand-

ard to pay fees and expenses of its own counsel and counsel for Standard's stockholder representatives who intervened in the proceedings. In No. 14,872, the Commission appeals from an order of the District Court modifying an order of the Commission awarding fees and expenses to certain counsel in the proceedings. We consider first the question presented in No. 14,871.

The Northern States Power Company, a Minnesota corporation (Minnesota), was organized in 1909. The Minnesota constitution at that time imposed double liability on holders of stock in that type of company and it was deemed impractical to try to sell the stock to the public. The promoters therefore formed the Northern States Power Company, a Delaware corporation (Delaware), which became the owner of all the preferred and common stock of Minnesota. Standard, organized in 1910, thereafter acquired 729,166 (all but 83) shares of Class B common stock in Delaware and 11,600 shares (3.4%) of its Class A common stock. Together, these shares represented 40% of the voting power in Delaware. At the time the Public Utility Holding Company Act (the Act) was passed in 1935, Standard, Delaware, and Minnesota were all holding companies subject to the provisions of the Act. Minnesota was also an operating public utility company. In 1938, Minnesota and Delaware submitted a plan for recapitalization of their corporate structures to bring themselves into compliance with the Act. This plan provided for the cancellation of the voting rights of the Class B stock, effective January 1, 1941, and also provided for the complete cancellation of the Class B stock on January 1, 1944, unless the consolidated net income of Delaware attained a specified level by that date. The Commission approved the plan in December, 1938. In June, 1942, Delaware submitted its first plan for dissolution under Section 11 (e) of the Act. This plan provided for the reclassification and increase of the number of shares of Minnesota's common stock and allocation of such stock to the stockholders of Delaware. At the hearings on

this plan a question arose as to whether the Class B stock of Delaware, was entitled to participate in the liquidation, in view of the cancellation provision of the Commission-approved plan for recapitalization of 1938. Standard, owner of practically all of the Class B stock, prevailed upon the Commission that the stock should participate and the plan, as amended, was sought to be enforced in the District Court. Although Standard favored enforcement of the First Amended Plan, certain Standard stockholders, along with other representatives of Delaware's common stock, intervened in the District Court action, contending that the participation of the common stock of Delaware was unfair and inequitable because based on an erroneous estimate of the foreseeable earnings of Minnesota. The District Court returned the plan and Delaware, in 1947, filed a second plan for dissolution with the Commission. The Second Amended Plan, as modified, was finally approved by the Commission and ordered enforced by the District Court in September, 1948. Under this plan the allocation of common stock of Minnesota to the common stockholders of Delaware was increased from 9.56% (under the First Amended Plan) to 22.01%, the participation of Delaware Class A stockholders being increased from 8.32% to 18.82% and the Class B stockholders from 1.24% to 3.19%.

The Second Amended Plan, as modified, provided, "The payment of fees and expenses * * * for the Liquidation and Dissolution of the Delaware Company shall be subject to the supervision of the Commission, and the Delaware Company will pay such fees and expenses as shall be approved by the Commission." In February, 1949, pursuant to this provision, the various participants in the proceedings filed applications with the Commission for allowance of fees and expenses. Fees aggregating approximately $850,000 and expenses in the amount of $115,000 were sought. After hearings before the Commission, total fees and expenses of about $623,000 were allowed. The Commission found and ordered, however, that the fees and expenses awarded

to Standard's counsel and counsel for Standard's stockholder groups, in the sum of $88,000, were properly chargeable to Standard and not to the Northern States Companies. Standard paid these claimants and sought reimbursement in the District Court after the Commission filed its application for enforcement of the fee allowances. The District Court upheld the order of the Commission and Standard has appealed.

Although the Commission found that Standard's representatives rendered valuable services to the reorganization proceedings, it held, "Standard, though its position as a holding company over the Delaware Company ceased in 1941, was the parent of the Delaware Company when the complexities were created which we found were required to be eliminated under the Act and which the plan was designed to eliminate. Standard was responsible for those complexities and thus for the necessity of these proceedings. Equity demands that its fees and those of counsel representing it or its stockholders should be borne by it alone, and not by the Delaware Company". The District Court, in affirming the order, stated, "In light of all the circumstances and in view of the prior relationship between Standard and the Delaware Company, this Court has no doubt that the Commission acted in accordance with sound, equitable principles and legal standards in requiring Standard to pay its own counsel".

We find no error in this conclusion of the District Court. The Act was designed to eliminate abuses in the public utility field conceived and fostered through the holding company device. The burden was placed on the holding company to rid itself of intricacies and complexities in its corporate structure detrimental to the public generally and more particularly to small security holders. It is entirely in accord with fairness that it should pay its own fees and expenses in effecting compliance on its part with the requirements of the Act.

Standard contends that since it was no longer a statutory parent of Delaware in 1942 when these proceedings began—the voting power of the Class B stock was cancelled as of January 1, 1941—it was under no statutory duty to proceed in the reorganization of the Northern States system and therefore should be accorded the same treatment as other stockholders in this action. This contention cannot be sustained. Standard was the statutory parent of Delaware on the effective date of the Act and it was just such parent-subsidiary combinations that the Act was intended to reach. Section 11 (e) of the Act provides that the Commission shall approve any plan of reorganization submitted by a holding company which is "fair and equitable to the persons affected by such plan." Obviously, payment of fees and expenses may affect the fairness and equitableness of the plan. In the light of this provision it seems clear that the burden of participation in such proceedings should fall on the holding company responsible for creating the conditions which must be eliminated, rather than on the small security holders who are in no sense responsible for the proceedings. Manifestly, the plan adopted is more fair and equitable to the persons affected—the security holders of Delaware—than if the assets of the subsidiary were depleted by paying counsel fees and expenses of the parent company.

The argument that since counsel fees and expenses of other stockholder groups were paid by Delaware (and in some cases by Minnesota), Standard should also have been reimbursed, is without merit. Standard's position in these proceedings was quite different from that of the other participants. Standard owned all but 83 shares of the Class B stock and a substantial amount of Class A stock in Delaware. It emerged from the reorganization as the largest single stockholder of Minnesota. Standard was a class in itself, rather than a true representative of many security holders in a class. Its primary purpose and objective was to secure for the Class B stock the greatest possible partici-

pation in the reallocation of Minnesota common stock. Any benefit the estate received by virtue of Standard's presence in the proceedings was merely incidental to this main purpose. It does not seem unreasonable to us that, under the circumstances, Standard should pay its own counsel fees and expenses.

The decision of the District Court in this respect is in conformity with the holdings of other courts which have passed on the question. Cf. *In re Public Service Corp. of New Jersey*, 3 Cir., ... F.2d .... (decided Feb. 25, 1954); *In the Matter of Eastern Gas & Fuel Associates*, (D.C. Mass.), ... F. Supp. ...., (decided Dec. 23, 1953); *In re Niagara Hudson Power Corp.*, (D.C. N.Y.), 114 F. Supp. 683. It is true that, so far as we have been able to determine, the holding company seeking reimbursement did not in any of these cases cease to be a parent corporation prior to the reorganization proceedings of the subsidiary. We deem that factor insufficient, however, to require a different result in this case.

The contention that the order requiring Standard to pay its own counsel was an arbitrary modification of the plan by the Commission is untenable. The plan provided that "the Delaware Company will pay such fees and expenses as shall be approved by the Commission". We see no conflict in the quoted provision and the Commission's order relative to Standard.

The decision of the court that the order of the Commission is supported by substantial evidence and was arrived at in accordance with legal standards was not erroneous and its order of enforcement is therefore affirmed.

No. 14,872.

In No. 14,872, we are asked to reverse an order of the District Court which modified an order of the Commission fixing fees and expenses awarded to certain counsel who participated in these section 11 (e) proceedings.

Appendix A.

A. Louis Flynn, counsel for Delaware during the many years of this litigation, requested allowance of fees in the amount of $147,380 and expenses in the sum of $9,946.95. The Commission awarded him $125,000 fees and $9,725.53 expenses. The District Court granted Flynn's request in full.

Fowler, Youngquist, Furber, Taney and Johnson (Youngquist), counsel for Minnesota, claimed $56,800 for services and $2,815.97 expenses. The Commission allowed Youngquist $40,000 fees and $2,338.70 expenses. The District Court granted the claim in full.

Barron, Rice and Rockmore (Barron), counsel for 70 Class A stockholders of Delaware, filed a claim for fees of $25,000 and expenses in the amount of $1,484.12. The Commission awarded Barron $15,000 fees and $1,240.77 expenses. The District Court increased the fees to $23,850 and allowed the expenses in full.

The jurisdiction of the District Court in reviewing the findings of the Commission is, of course, fairly narrow. It is limited to a determination of whether the findings are supported by substantial evidence and were arrived at in accordance with legal standards. *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96. The District Court held, with respect to the above three appellees, that the Commission's findings and conclusions "are not supported by substantial evidence and were not arrived at in accordance with legal standards." We think the District Court's action was without error.

Flynn and Youngquist filed claims for services and expenses which the companies involved in the proceedings found were fair and reasonable and which they expressed a willingness to pay. The Commission, although not finding that the claims were unreasonable or excessive, awarded less than the amounts requested because of "duplication of services" and the fact that the claimants were unsuccessful in getting the Commission to accept certain of the proposals.

Appendix A.

At the outset it should be noted that counsel for the company in reorganization stands in a somewhat different position than counsel for stockholder groups who intervene. Compensability of company counsel is rightly determined by the reasonableness of the proposals they advance, and not primarily by the benefits conferred on the estate. A realistic view must be taken of the attorney-client relationship existing between counsel and company. The proposals submitted by a company attempting to comply with the provisions of the Act are expressions of management regarding company policy. The counsel they employ is a conduit of company policy, and to make his compensation depend upon benefits conferred upon the estate, is placing a burden on him not contemplated by the nature of the relationship. The Commission, although recognizing the rule, did not find that the proposals submitted by Flynn and Youngquist were unreasonable, saying merely that they were not acceptable to the Commission. It also found that these counsel unsuccessfully opposed other proposals raised in the proceedings, and adopted certain dilatory and obstructive tactics. The record seems clear that the strategy employed by counsel was in the interest, if not at the behest, of the company. Under the circumstances, the Commission should have accorded greater weight to the contractual relationship between the parties. Where the fee requested and agreed upon is clearly reasonable and does not affect the fairness or equitableness of the plan, to arbitrarily reduce it on the ground that some of the tactical moves of company counsel did not meet the approval of the Commission is, in our view, not in harmony with proper legal standards. This is not to be construed as meaning that the attorney-client relationship shall always be the dominating factor. We hold merely that, under the facts presented here, the agreement between counsel and company was not given its true evidentiary weight by the Commission.

Similarly, the record does not show that a reduction of fees was required on account of duplication of services.

There necessarily must have been some duplication in the work of Flynn and Youngquist, in view of the parent-subsidiary relationship of the companies and the nature of the proceedings. However, there is no showing by the Commission that Flynn and Youngquist did not at all times make a good faith attempt to keep such duplication at a minimum. The record supports their contentions that they did. The companies were aware of any duplicative work performed but agreed that the fees requested were reasonable for the services rendered.

On the record as a whole, we think the District Court was correct in granting Flynn and Youngquist the full amount of their claims and that its order modifying the order of the Commission was a proper exercise of its power of review. See and compare *In re North American Light & Power Co., et al.*, 101 F. Supp. 931; opinion on rehearing, 106 F. Supp. 686, affirmed sub. nom. *In re North American Light & Power Co., et al.; Securities & Exchange Commission* v. *Masterson*, 3 Cir. (1953), 202 F. 2d 638, cert. den., sub. nom. *Securities & Exchange Commission* v. *Masterson*, 346 U. S. 818.

Somewhat different considerations are applicable in determining whether the District Court properly increased the amount awarded by the Commission to Barron. Barron, who represented 70 Class A stockholders of Delaware, originally applied for fees in the amount of $37,500. At the request of the Commission, Barron and other claimants met with officials of the companies to discuss fee allowances. After a hearing and negotiations were had, the companies filed a detailed report in which they recommended that Barron be allowed the sum of $25,000. Barron agreed to accept this amount. The Commission reduced this amount to $15,000, saying that although Barron contributed to the development of the plan as finally approved, in view of the "duplication of effort" with other Class A stockholder groups, his fee should be reduced. Concededly, Barron took the initiative in opposing and defeating the

First Amended Plan because it unfairly represented the interests of the Class A stockholders. Later, other groups of Class A holders intervened, and, as the Court below noted, one such group (the Lehman group) assumed the "laboring oar" in securing greater participation for Class A holders in the liquidation of Delaware. But Barron continued to participate actively and vigorously in the proceedings and persuaded the Commission to adopt many of his proposals. He urges that any duplication which existed was attributable to the other Class A representatives who entered the proceedings after he did. Counsel for the Lehman group, which consisted of three Class A stockholders, received $140,000 for their services. Reduced to hourly rates, this represents $24.48 per hour. Barron received $9.43 per hour. Although differences in hourly rates awarded counsel raises no inference that one has been unfairly compensated, we find nothing in the record to justify such a disparity in fees allowed counsel for these two groups. The District Court was not in error in concluding that the Commission's reduction of Barron's fee, arrived at after arms-length negotiations with the companies, was not supported by substantial evidence and could not be sustained. The award of $23,850 to Barron by the District Court, which represents an hourly rate of $15.00, is fully warranted on the record and appears to provide fair and reasonable compensation for the services he performed.

There remains to be considered the expense item of $243.35 incurred by Barron in traveling from New York to Minneapolis to discuss fee allowances with company officials. In denying this item, the Commission stated, "• • • expenses incurred in connection with preparing or presenting claims for compensation are not reimbursable". In ordinary circumstances this salutary rule helps preserve the assets of the estate in reorganization. But here Barron was under no obligation to expend his own money in con-

ferring with company officials regarding fee allowances. He did so at the request of the Commission. It is undeniable that the estate benefited by this conference, as it materially expedited the final phase of the reorganization proceedings. The District Court was therefore acting in accordance with legal standards and sound equitable considerations in allowing Barron reimbursement of this item.

The orders of the District Court brought up in appeals No. 14,871 and No. 14,872 are in all respects affirmed.

Appendix A.

(Judgment.)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

SEPTEMBER TERM, 1953.

MONDAY, APRIL 19, 1954.

STANDARD GAS AND ELECTRIC COMPANY,
Appellant,

No. 14871

vs.

SECURITIES AND EXCHANGE COMMISSION, NORTHERN STATES POWER COMPANY (DELAWARE), and NORTHERN STATES POWER COMPANY (MINNESOTA),

SECURITIES AND EXCHANGE COMMISSION,
Appellant,

No. 14872.

vs.

NORTHERN STATES POWER COMPANY (DELAWARE), NORTHERN STATES POWER COMPANY (MINNESOTA), A. LOUIS FLYNN, FOWLER, YOUNGQUIST, FURBER, TANEY & JOHNSON, and BARRON, RICE & ROCKMORE.

Appeals from the United States District Court for the District of Minnesota.

These causes came on to be heard on the record from the United States District Court for the District of Minnesota, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the Orders of the said District Court brought up in the appeals in these causes, be, and they are, in all respects, hereby affirmed.

APRIL 19, 1954.

Appendix B.

The pertinent provisions of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 822, 15 U. S. C. §§79a, 79k(e)) (Section 11(e) of the Act) are as follows:

"Sec. 79k

* * * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever

located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 243, 5 U. S. C. §§1001, 1009) (Section 10) are as follows:

"§1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * * * * *

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by

the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The pertinent provisions of the Bankruptcy Act (52 Stat. 883, 900, 11 U. S. C. §§501, 643) (Section 243 of Chapter X) are as follows:

"§643. Creditors and stockholders; attorneys therefor

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 218

STANDARD GAS AND ELECTRIC COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 29-40) is reported in 212 F. 2d 407. The opinion of the District Court (R. 266-288) is reported in 119 F. Supp. 331. The findings, opinion, and order of the Securities and Exchange Commission (Holding Company Act Release No. 11145, R. 222-246) are unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App., p. 41) was entered on April 19, 1954. The peti-

tion for a writ of certiorari was filed on July 15, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), and Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79x(a).

QUESTION PRESENTED

Whether, under the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission's authority with respect to reorganization fees was properly exercised by an order denying a registered holding company reimbursement of expenses and fees from the estate of a former subsidiary which was in reorganization.

STATUTE INVOLVED

Sections 11(e) and 11(f) of the Public Utility Holding Company Act of 1935 are set forth in the Appendix, *infra,* pp. 14-16.

STATEMENT

Standard Gas and Electric Company seeks review of a judgment of the United States Court of Appeals for the Eighth Circuit, affirming an order of the United States District Court for the District of Minnesota, concerning a determination by the Securities and Exchange Commission of the fees and expenses payable in connection with the dissolution of Northern States Power Company (Delaware), and related transactions by Northern States Power Company (Minnesota), pursuant to Section 11 of the Public Utility Holding Company

Act of 1935.[1] That judgment upheld the Commission's determination that Standard is not entitled to reimbursement from the Minnesota Company of the fees and expenses which Standard was required to pay in connection with those proceedings.

The dissolution plan made no provision for payment by the Delaware Company of Standard's fees and expenses (see Pet. App., p. 35), but provided generally that the payment of fees and expenses in connection therewith would be "subject to the supervision of the Commission", and that the Delaware Company would "pay such fees and expenses as shall be approved by the Commission" (R. 248).

Standard, the Delaware Company, and the Minnesota Company were all registered holding companies prior to the dissolution of the Delaware Company; the Minnesota Company was also an operating public utility company (R. 2). Standard and the two Northern States companies were organized at about the same time (1909-1910), by the same promoters (R. 16-17).[2] Since 1910 and until

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[1] Standard Gas and Electric Co. will be referred to herein as "Standard"; Northern States Power Company (Delaware) as the "Delaware Company"; Northern States Power Company (Minnesota) as the "Minnesota Company"; the Securities and Exchange Commission as the "Commission"; and the Public Utility Holding Company Act of 1935 as the "Act". "R. —" refers to the printed Record in the court below. "Pet. App." refers to the decision below printed as Appendix to the Petition.

[2] *Utility Corporations*, Senate Document 92, Part 36, 70th Cong., 1st Sess., pp. 8, 267-271; *H. M. Byllesby & Company*, 6 S.E.C. 639, 642 (1940).

1941, Standard, through voting power, dominated and controlled the Delaware Company and the Minnesota Company, and directed their policies. Standard owned substantially all of the Delaware Company's Class B common stock (729,083 shares out of 729,166 shares), representing 39.4% of the entire voting power, and also owned 11,600 shares representing 3.4% of the Class A common stock (R. 3-5). In 1941 the voting rights of the Class B common stock were terminated pursuant to a plan of recapitalization of the Delaware Company approved by the Commission in December 1938 (R. 5). That plan also provided for the cancellation of the Class B common stock by January 1, 1944, unless the consolidated net income of the Delaware Company and its subsidiaries had attained a specified level by that date (R. 239).

The sole asset of the Delaware Company, except for treasury cash, was all of the common stock of the Minnesota Company (R. 224-225). In June 1942 the Delaware Company filed with the Commission a dissolution plan pursuant to Section 11 (e) of the Act, and the Minnesota Company filed an application-declaration pursuant to Sections 6, 7, and 12 of the Act covering the transactions to be effected by it in connection with the plan. The dissolution plan provided that the preferred and common stockholders of the Delaware Company would receive the common stock of the Minnesota Company. In the proceedings which followed, the major question was the proper allocation of the common stock of the Minnesota Company among the

preferred and common stockholders of the Delaware Company (R. 18, 42-44), including the question whether the Class B common stock held by Standard should be permitted to participate in the distribution at all (R. 18-20, 57). Standard itself, and a group of stockholders of Standard, participated actively in the litigation of the issues related to those questions (R. 238-241). The plan and related transactions by the Minnesota Company were approved by the Commission, and the plan was approved and enforced by the United States District Court (R. 225-226).

Pursuant to the plan as approved and enforced, Standard acquired 364,684 shares (approximately 3.8%) of the common stock of the Minnesota Company, 303,784 shares in exchange for Class B common stock and 60,900 shares in exchange for Class A common stock of the Delaware Company (R. 58, 268). Standard thus became the largest single stockholder of the Minnesota Company; its holdings have since been sold for $3,400,000.[3]

Applications for the allowance of fees and expenses were filed thereafter with the Commission. The Commission determined the amount of the fees to be paid to counsel for Standard and for security holders of Standard, and no objection was raised either by Standard or by such counsel in the courts below concerning the amount of the allowances, aggregating about $88,000 (R. 238-241, 246). The

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[3] *Standard Gas and Electric Company*, Holding Company Act Release No. 8923 (1949).

Commission decided, however, that these amounts should be paid by Standard itself and not by the Delaware Company (R. 241-243, 246). Standard contended that these amounts should be paid by the Delaware Company. On March 3, 1953, the District Court entered its opinion and order, which overruled Standard's objections and enforced that determination of the Commission (R. 285-293); and on April 19, 1954, the Court of Appeals entered an order affirming the order of the District Court. Petitioner seeks a review of this order of the Court of Appeals.

ARGUMENT

1. The decision of the court below is in conformity with the decisions of every other court which has passed upon the question. It is in accord with specific holdings of courts in the First, Second, and Third Circuits. *In the Matter of Eastern Gas and Fuel Associates,* 120 F. Supp. 460 (D. Mass.), appeal pending, C. A. 1, No. 4853; *In re Niagara Hudson Power Corp.,* 114 F. Supp. 683 (N.D. N.Y.), appeal pending, C. A. 2, No. 3476; *United Corporation* v. *S. E. C.,* 211 F. 2d 231 (C. A. 3, 1954), petition for a writ of certiorari pending, No. 99, this Term. In large part, the arguments advanced by the petitioner here and the opposing positions of the Commission are substantially the same as those involved in the *United Corporation* case and the Court is respectfully referred to our opposition in that case.

In re Electric Power and Light Corporation, 210 F. 2d 585 (C. A. 2), which petitioner cites as being

in conflict with the decision below (Pet. pp. 9-12), did not involve the question presented by this petition. The Commission, in its administrative proceedings, had denied to the parent company (Electric Bond & Share Company), as it did here, reimbursement for its fees and expenses from its subsidiary, but the parent did not contest the Commission's decision. The sole ruling of the court of appeals in the *Electric* case was that the Commission was without jurisdiction to pass upon the fees and expenses payable by the parent to its own financial adviser. While the Commission believes this ruling is wrong,[4] there is nothing in that decision which in any way conflicts with the decision below. Indeed, in that case the Court of Appeals for the Second Circuit considered the issue raised here to be well settled, stating (p. 588):

> Thus it was plainly within the jurisdiction of the Commission to deny in the exercise of sound discretion the application of Drexel and Company, for the allowance of its fee to be paid by Electric for services rendered Bond and Share, and no one questions that. As much is true, of course, in respect to the application of Bond and Share for allowances to be paid by Electric.

Petitioner attempts to predicate a conflict between this and the *Electric* case (Pet. p. 10) upon

[4] A petition for a writ of certiorari seeking a review of the judgment of the United States Court of Appeals has been filed. *S.E.C.* v. *Drexel & Co.*, No. 153, this Term.

the fact that the Commission had passed upon the *amount* of the fees and expenses to be paid by Standard for the services rendered to it. However, that question is not involved in this case. Neither Standard nor the recipients of the fees and expenses paid by Standard raised any question as to amount in either of the courts below.

2. The Commission's order was a proper administrative decision, correctly affirmed by the courts below.[5] Allowance of fees is one of the large areas of discretion committed by the Act to the judgment of the Commission. *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96, 126; *In re Niagara Hudson Power Corp.*, 114 F. Supp. at p. 685. The Commission's authority to pass upon allowance of fees and expenses is found in Sections 11(e), 11(f), 7, 10 and 12 of the Act.

During the entire course of its administration of Section 11 of the Act, the Commission has passed upon claims of registered holding companies to be reimbursed for services rendered in connection with the reorganization of their subsidiaries. In passing upon such claims, the Commission has developed the general policy of requiring registered holding companies to pay their own expenses incurred in reorganization of their subsidiary companies, including the fees of lawyers and experts

[5] Petitioner's inference that the Commission's determination was sustained on grounds other than those advanced by it is without substance. Both courts below specifically found that the Commission's order was supported by substantial evidence and was arrived at in accordance with legal standards (Pet. App., p. 35).

they retain.[6] As the court stated in the *Niagara* case (114 F. Supp. at p. 688):

> Previous determinations by the Commission are in line with the decision now discussed. One determination was rendered after the decision challenged here and indicates an honest belief in and reiteration of its previous position. As always, distinctions may be made in the facts but enough similarity is present to show a consistency by the Commission, and thus answer the charge that it was capricious and arbitrary in this instance.

Petitioner's citation of bankruptcy cases is not conclusive on this issue. It may well be that the Commission has frequently followed Chapter X principles governing the payment of fees, and that in Chapter X an important criterion for determining fees to be paid out of the estate is the benefit to the estate. But that is far from saying that the Commission is not permitted and required to develop additional policies and principles to cover situations which arise peculiarly from holding com-

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[6] See *Electric Power and Light Corporation*, Holding Company Act Release No. 11175 (April 21, 1952); *Portland Gas and Coke Company*, Holding Company Act Release No. 11560 (October 31, 1952); *Niagara Hudson Power Corporation*, Holding Company Act Release No. 11667 (January 14, 1953), approved, *In re Niagara Hudson Power Corp., supra; Eastern Gas and Fuel Associates*, Holding Company Act Release No. 11954 (May 29, 1953), approved on that point, *In re Eastern Gas and Fuel Associates, supra; Public Service Corp. of N. J.*, Holding Company Act Release No. 12000 (1953), affirmed *supra*, petition for certiorari pending.

pany reorganizations. Indeed, this Court has specifically upheld the Commission's power to formulate its own policies to deal with such peculiar situations. *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194. Neither the Bankruptcy Act nor the Public Utility Holding Company Act contains any provisions which preclude the Commission from developing and applying policies to meet the peculiar problems of holding company reorganizations under the Act.

In this case, both the courts below and the Commission have stressed the fact that Standard's obligations were incurred primarily for its own benefit (R. 242, 286-287, Pet. App., pp. 34-35). Standard was a substantial holder of the Class A common stock, and the holder of practically all of the Class B common stock, of the Delaware Company. As such, its position in the reorganization proceedings was unique; the "class" of security holders primarily benefited by its participation was Standard itself. Standard was not and could not be in the position of an individual holder of securities of a particular class, whose participation benefits all other holders of securities of the same class. Moreover, while there are some bankruptcy cases in which a holder of all securities of a class was reimbursed for fees out of the estate, there are others where reimbursement has been denied.[7] Surely a

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[7] *E.g.*, *Pennish* v. *A. Herz*, 81 F. 2d 511 (C.A. 7, 1936); *In re Mt. Forest Fur Farms*, 157 F. 2d 640, 651 (C.A. 6, 1946); *Crutcher* v. *Logan*, 102 F. 2d 612 (C.A. 5, 1939); *In re General Carpet Corporation*, 38 F. Supp. 200 (E.D. Pa. 1941).

hard and fast rule could not be laid down even in bankruptcy cases, and certainly not in Holding Company Act situations.

3. Petitioner characterizes the Commission's determination as a "penalty" (Pet. p. 19) for fraud or mismanagement (Pet. p. 20) and reiterates its innocence of the complexities in the system. The opinions of the Commission and the courts below make it quite clear that the decision does not "penalize" Standard for its past activities to the detriment of the Northern States system while Standard was in control. It is no "penalty" to require a holding company to pay for valuable services rendered directly to it in its own behalf.

In any event, both courts below have specifically upheld the Commission's findings concerning Standard's responsibility for the complexities ultimately cured through the reorganization (R. 290, Pet. App. p. 33). The Minnesota Company, the Delaware Company, and Standard were all created by the same promoters in 1909-1910.[8] From the creation of these companies until 1930 that group "through ownership of voting securities, interlocking directors and officers, and otherwise, completely dominated Standard Gas and its subsidiaries."[9] For over thirty years after its organization Standard itself controlled the Northern States system, and created or perpetuated the complexities condemned by the Act, and for six years from 1935 to

[8] *Utility Corporations*, Senate Document 92, Part 36, 70th Cong., 1st Sess., pp. 8, 267-271.

[9] *H. M. Byllesby & Co.*, 6 S.E.C. 639, 642 (1940).

1941 continued to do so notwithstanding the passage of the Act in 1935. The fact that Standard's voting power was cancelled in 1941, as a result of the proceedings commenced in 1938, does not put it in the position merely of an innocent bystander with no responsibility for the inequities that existed until the consummation of these proceedings.[10]

Actually, that cancellation of the voting power was one of the steps taken to correct the results of Standard's domination of the Northern States Companies. Others were accounting adjustments approved in 1941 (R. 10-13); additional accounting adjustments required in 1945 (R. 20-26) and 1946 (R. 33-35); and the liquidation of the Delaware Company itself. Affirmative claims on behalf of the Minnesota Company against Standard were asserted in independent lawsuits filed by stockholders of the Minnesota Company, which were settled before trial.[11] Whatever may have been the "legality" (Pet. p. 19) of Standard's conduct of the affairs of the Northern States companies, the record amply supports the findings of the Commission and of the courts as to Standard's responsibility for the complexities which necessitated the reorganization proceedings.

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[10] It should be remembered that Standard and its subsidiaries had been the subject of proceedings instituted to require compliance with the Act. Standard had been directed to dispose of Northern States. See *Standard Gas and Electric Company*, 9 S.E.C. 862, 872 (1941).

[11] The testimony at the fee hearing (Tr. 164-166, 249-250, January 11, 1950) refers to this litigation, which was settled by payments aggregating $330,000, of which the Minnesota Company received $250,000.

4. The Commission's determination was not based exclusively on the status of Standard as a holding company; nor on the results of its domination of the Northern States system; nor on its unique position as the Class B stockholder. These are circumstances which, among others, led the Commission to a conclusion which represents a policy determination in an administrative area which should not be disturbed unless it lacks "any rational and statutory foundation." *S. E. C.* v. *Chenery Corp.*, 332 U. S. 194, 207.

CONCLUSION

The decision below is correct. It is not in conflict with holdings in any other circuit and there is no need for further review. The petition should be denied.

Respectfully submitted,

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AUGUST, 1954.

APPENDIX

Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U.S.C. 79a *et seq.*):

Sec. 11 * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to

such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after opportunity for hearing prior to its submis-

sion to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

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